

## **Part 528 – Agricultural Conservation Easement Program (ACEP)**

### **Subpart H – ACEP-ALE Eligible Entity Certification**

#### **528.70 Overview of the Entity Certification Process**

A. NRCS employs a national certification process through which eligible entities may be certified. Certification allows eligible entities administrative flexibility when participating in ACEP-ALE, based on demonstrated experience preserving agricultural land and successful participation in NRCS's Farmland Protection Program (FPP), Farm and Ranch Land Protection Program (FRPP), or ACEP-ALE.

B. An eligible entity may submit a written request for certification and all required request package documents at any time to the State Conservationist for the State in which they are seeking certification. There is no specific solicitation period for certification requests.

(1) Multistate Certification.—If an eligible entity seeks certification in multiple States, the written request must be submitted to the State Conservationist for the State in which the eligible entity has completed the greatest number of FPP, FRPP, or ACEP-ALE funded easement acquisitions and must list all the States for which it is seeking certification. Eligible entities seeking multistate certification must demonstrate the ability to address State-specific conservation easement requirements in each State listed. The lead State Conservationist will notify the Regional Conservationist and other affected State Conservationists of the request.

C. The State Conservationist will review the materials submitted in the request package. Based on the review, the State Conservationist may recommend the entity for certification to the Regional Conservationist, may deny the request for certification, or may follow up with the entity as appropriate to obtain any additional information.

D. State Conservationist recommendations to approve certification will be forwarded to the Regional Conservationist. Final determination on certification approval rests with the Regional Conservationist. The Regional Conservationist will notify the eligible entity of the final decision in writing and send a copy to the appropriate State Conservationists.

E. If the State Conservationist or the Regional Conservationist determines that an eligible entity does not meet certification requirements, written notification will be sent to the eligible entity and will identify the reasons for denying certification. The eligible entity may be invited to resubmit its application after addressing the criteria identified in the denial. An eligible entity's failure to achieve certification does not affect its ability to participate in ACEP-ALE as a noncertified eligible entity.

#### **528.71 Certification Prerequisites**

An entity seeking certification must meet the requirements of an eligible entity as identified in section 528.32 of this part and must provide evidence to the State Conservationist documenting that the entity—

- (1) Agrees to use easement valuation methodologies identified in 7 CFR Section 1468.24 for ACEP-ALE funded easement acquisitions.
- (2) Holds, manages, and monitors a minimum of 25 agricultural easements (these do not have to be NRCS-funded easements).
- (3) Holds, manages, and monitors a minimum of five ACEP-ALE, FRPP, or FPP funded conservation easements in good standing. States will verify this information based on data from NEST.

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- (4) Completes conservation easement transactions in a timely fashion. Closing efficiency will be evaluated by determining the average time to close all ACEP-ALE, FRPP, or FPP funded conservation easements over the most recent 5-year period.
- (5) Maintains the capacity to enforce the provisions of easement deeds and provides documented history of such enforcement. Capacity to enforce is a combination of monitoring conservation easements and addressing violations of conservation easement terms. The entity must demonstrate that in the last 5 years it has—
  - (i) Monitored all ACEP-ALE, FRPP, or FPP funded conservation easements on at least an annual basis, with an onsite visual inspection at least once every 5 years and provided required monitoring reports to NRCS annually.
  - (ii) Brought violations of easement provisions into compliance.
- (6) For nongovernmental organizations, the existence of a sufficient dedicated fund for the purposes of legal defense, monitoring, and enforcement. Dedicated funds are also referred to as “stewardship funds” or “legal defense funds.”
- (7) Agrees in its request for certification to use the published ACEP-ALE grant agreement for certified eligible entities if certified. This agreement will satisfy the requirement that the entity have a plan for administering easements enrolled under this part, as determined by NRCS (see Subpart U, “Exhibits,” for sample cover letter from an entity requesting certification).

## **528.72 Certification Request Package**

Eligible entities must submit a written request for certification along with all required documentation to the appropriate State Conservationist. The request package should be submitted to the State Conservationist electronically, must address all of the certification prerequisite requirements, and must include the following documents:

- (1) A cover letter wherein the entity—
  - (i) Requests certification under ACEP-ALE
  - (ii) Outlines the eligible entity’s ability to meet ACEP-ALE certification requirements
  - (iii) Agrees to use easement valuation methodologies identified in 7 CFR Section 1468.24 for ACEP-ALE funded acquisitions
  - (iv) Agrees to use the published ACEP-ALE grant agreement for certified eligible entities if it is certified, with a copy of the grant agreement attached to the cover letter as a reference
- (2) A list of 25 agricultural easements that the eligible entity holds, including the location of such easements (State and county), the date each listed easement was last monitored, and the results of that monitoring visit (e.g. in compliance, in violation, etc.).
  - (i) If the entity requests a waiver to this requirement, then the entity must provide evidence of comparable experience working with conservation easements and with the agricultural community. This evidence must include a list of up to 25, but no less than 10, conservation easements or similar interests in real property the entity holds, manages, or enforces, and a written explanation of how this experience ensures the entity can meet ACEP-ALE purposes and requirements. The State Conservationist has authority to grant this waiver and must document the basis for their determination.
- (3) A list of the eligible entity’s five most recently closed ACEP-ALE, FRPP, or FPP funded conservation easement transactions and the final policy of title insurance for each.
- (4) Evidence that the entity has the capacity to enforce the provisions of easement deeds and history of such enforcement, including—

- (i) The entity must provide a copy of its most recent annual monitoring reports for all ACEP-ALE, FRPP, or FPP funded conservation easement, unless previously submitted to NRCS.
- (ii) Verification from States based on NEST data that the entity monitored all of its ACEP-ALE, FRPP, and FPP easements in the year preceding the request for certification.
- (iii) Documentation of resolution for all ACEP-ALE, FRPP, or FPP funded conservation easements that were violated.
- (iv) Documentation of any enforcement actions the eligible entity has taken within the past 5 years in, such as—
  - Court documents, such as motions initiating an enforcement action and court’s opinions, narrative description of specific enforcement actions and violation resolution strategies.
  - If no enforcement issues, a narrative description of any proactive actions taken by the eligible entity to educate easement landowners, maintain contact with them, and prevent easement violations.
- (6) A copy of the written acquisition, monitoring, and enforcement policies of the eligible entity.
- (7) If a nongovernmental organization, documentation of the existence of sufficient dedicated fund and the amounts set aside in the dedicated fund for monitoring and enforcement. Documentation must include either the relevant portions of the eligible entity’s financial statements or bank records.
  - (i) A dedicated fund is considered committed to these purposes if it is held in a separate account and may not be used for other purposes.
  - (ii) The dedicated fund is considered sufficient if it has at least \$50,000 for legal defense and \$3,000 per easement for management and monitoring.
  - (iii) A sufficiently capitalized risk pool will satisfy the requirement of a dedicated fund, however unless the risk pool explicitly covers monitoring of easements then documentation of dedicated monitoring fund will still be required.
- (8) If an eligible entity is seeking multistate certification, the eligible entity must include a list of the States in which it is seeking certification.
- (9) Entities are encouraged to provide documentation of any professional accreditation or certification the entity has received that relates to the eligible entity’s ability to meet ACEP-ALE certification requirements. This documentation is not required, but may be considered during review of the request for certification.

### **528.73 Reviewing the Certification Request Package**

A. The State Conservationist or designee will review an entity’s certification request package for completeness and compliance with the requirements listed above (see Subpart U, “Exhibits,” for sample letter acknowledging receipt of entity certification request package). Additionally, the State will assemble and review NRCS records to verify the requirements for certification have been met and will prepare necessary supporting documents, including—

- (1) The State-completed “Certification Request Review and Determination Checklist” (see Subpart U, “Exhibits,” for certification request review and determination checklist).
- (2) Any documentation related to specific certification criteria that the State Conservationist determines are salient to whether the eligible entity meets certification criteria.
- (3) The State Conservationist waiver to the requirement that the entity hold 25 agricultural easements, if applicable.
- (4) A review of the five most recently closed ACEP-ALE/FRPP funded conservation easement transactions to verify that—

- (i) The eligible entity's appraisal was approved by the technical appraisal reviewer and supports the Standard Form (SF) 270 submitted by the eligible entity.
- (ii) The conservation easement deed language was approved by NRCS and is the same conservation easement deed language recorded by the eligible entity.
- (iii) The final policy of title insurance only contains exceptions from coverage approved on the certificate of use and consent.
- (iv) All parcels that include highly erodible croplands have an up-to-date conservation plan that was developed in accordance with the HEL/WC provisions in the NFSAM.
- (5) Confirmation using NEST data that the average closing time is 24 months or less for the 5 years preceding the request for certification.
  - (i) Time to close an easement is measured from the date NRCS obligated funds to the date of the last signature on the conservation easement deed.
  - (ii) Closing efficiency is measured by the average closing time of all parcels funded in the 5 years preceding the request.
  - (iii) If less than 5 years of data are available, the closing efficiency will be based upon the number of years of available data.
  - (iv) The State Conservationist may waive the 24-month-or-less average closing time requirement if the entity documents that its closings were delayed for reasons beyond its control. Delay may not be attributed to NRCS review of documents unless any single document review took longer than 90 days from the date the complete document was submitted to NRCS.
- (6) Verification using NEST data that the entity has conducted annual monitoring and provided an annual monitoring report for every ACEP-ALE, FRPP, or FPP conservation easement held by the eligible entity.
- (7) Confirmation that the eligible entity provided a brief description of how any ACEP-ALE, FRPP, or FPP easement violations were brought back into compliance. States will ensure the condition reported in NEST is consistent with the report provided by the entity.

B. If the request package is incomplete, States will provide the entity with a list of missing items needed before the review can be completed. Incomplete packages will not be forwarded to the Regional Conservationist for approval (see Subpart U, "Exhibits," for sample letter notifying entity of incomplete request package).

C. If the request package is complete but the entity does not meet the certification requirements, the State Conservationist will notify the entity in writing with a copy to the Regional Conservationist. The letter must identify the reasons the entity failed to meet the necessary criteria and may invite the entity to an updated certification request (see Subpart U, "Exhibits," for sample letter notifying entity of denial of certification request).

D. If the State Conservationist determines the request is complete, compliant, and recommends the entity for certification, the State Conservationist will forward the request package, additional supporting documentation, and his or her recommendation to the Regional Conservationist using the "Certification Review Request and Determination Checklist" (see Subpart U, "Exhibits," for certification request review and determination checklist).

Note: If an entity is seeking multistate certification, the Regional Conservationist will request the State Conservationist from each of the listed States to provide any information the State Conservationist determines is salient to whether the eligible entity meets the certification criteria.

E. The Regional Conservationist will review the certification request package and the supporting documentation from the States and will document their review using the eligible entity "Certification Request Review and Determination Checklist" (see Subpart U, "Exhibits," for certification request review and determination checklist).

F. If the Regional Conservationist determines that the eligible entity has met the requirements for certification, then the Regional Conservationist will notify the entity in writing that it is a certified eligible entity in accordance with 7 CFR Section 1468.27 (see Subpart U, “Exhibits,” for sample letter notifying entity of approval of certification request). The Regional Conservationist will copy the Deputy Chief for Programs and the State Conservationist in all States in which the certification is effective. The notification will—

- (1) Include the time period during which the certification is effective.
- (2) Inform the certified eligible entity that their certification does not extend to eligible entities funded through the certified eligible entity.
- (3) Require execution of the published ACEP-ALE grant agreement for certified eligible entities prior to obligating ACEP-ALE funds.

G. If the Regional Conservationist determines that the eligible entity does not yet meet the certification requirements, he or she will notify the entity in writing and will copy the Deputy Chief for Programs and the appropriate State Conservationists (see Subpart U, “Exhibits,” for sample letter notifying entity of denial of certification request).

#### **528.74 Certification and Administrative Flexibility Provided to Certified Eligible Entities**

Upon NRCS certification the certified eligible entity will carry out the actions required by ACEP-ALE with greater independence and without significant involvement from NRCS. As a result:

- (1) NRCS may enter into an ACEP-ALE grant agreement with the certified eligible entity through which NRCS may obligate funding for a maximum of 5 years. An eligible entity must request certification and be approved as a certified eligible entity prior to entering into an ACEP-ALE grant agreement for certified eligible entities. An eligible entity certified under FRPP is considered certified under ACEP-ALE so long as it meets the certification requirements in this part and continues to pass the annual quality assurance reviews.
- (2) New parcels or prior-year unfunded parcels may be submitted for funding by certified eligible entities but must compete for funding each year.
- (3) The certified eligible entity may apply the benefits of certification to parcels funded under an existing cooperative agreements executed in fiscal year 2015 or later by transferring the funded parcels and associated funds to the grant agreement.
- (4) Certified eligible entities must ensure the agricultural land easement plan and any required component plans are completed prior to closing and signed by the landowner prior to closing. NRCS review of the agricultural land easement plan is not required prior to closing unless the certified eligible entity selects NRCS to develop the plan. For plans not developed by NRCS, the eligible entity may request NRCS review and approval of the agricultural land easement plan prior to closing, but it is not required. NRCS will review the agricultural land easement plan after closing as part of the quality assurance review.
- (5) Certified eligible entities may use their own terms and conditions in the agricultural land easement deeds and must include the standard United States Right of Enforcement clause as stated in the grant agreement. The certified entities deed terms and conditions must address the ACEP-ALE minimum deed requirements identified in 7 CFR Section 1468.25(d) and in the grant agreement. To address the ACEP-ALE minimum deed requirements certified eligible entities may elect to use but are not required to use the “ALE Minimum Deed Terms” addendum published by NRCS.
- (6) Certified eligible entities are required to obtain fair market value appraisals of the agricultural land easement, ensure clear title, and record the agricultural land easement deeds in accordance with the terms of the grant agreement.

- (7) Certified eligible entities will close ACEP-ALE easements without NRCS approving the agricultural land easement deeds, conducting title reviews, reviewing title policy commitments, or approving appraisals prior to closing. NRCS will conduct reviews of the easement acquisition transaction after closing through the quality assurance review process.
- (8) In unique circumstances, the certified eligible entity may request NRCS review of a proposed deed template prior to execution of the ACEP-ALE grant agreement. NRCS may decline to review these documents prior to closing without impairing NRCS's ability to complete and enforce a post-closing quality assurance review.

## **528.75 Quality Assurance Review and Decertification**

A. Upon certification by NRCS, the certification remains effective throughout the duration of the Agricultural Act of 2014 or until the expiration of the funded grant agreement, whichever is longer, unless the entity is decertified. NRCS will conduct annual quality assurance reviews of the easement acquisition transaction and annual monitoring reports to ensure certified eligible entities continue to meet the certification requirements. These reviews may occur at any time during the fiscal year. The reviews must determine whether the conservation easement was acquired and is being monitored and enforced in accordance with the requirements set forth by NRCS in its certification of the eligible entity and the grant agreement entered into with the certified eligible entity.

B. NRCS will review at least 15 percent of the conservation easement transactions submitted by the certified eligible entity for payment each fiscal year. NRCS will review the agricultural land easement deed, title clearance and final policy of title insurance, appraisal, the baseline documentation report, and agricultural land easement plan, for every parcel in the 15 percent of parcels selected for quality assurance review. To perform a quality assurance review on the—

- (1) Appraisal.—NRCS will complete a technical review according to the technical review standards and specification in 440-CPM, Part 527, Subpart F.
- (2) Final policy of title insurance.—NRCS will complete a “Certificate of Use and Consent” based on a review of the final title insurance policy to determine if any unacceptable encumbrances remain on the title. If unacceptable encumbrances remain on the final title policy, NRCS will also review the certificate of use and consent or equivalent that was completed by the eligible entity prior to closing (see subpart G of this manual) and any associated title clearance documents. Purchasing easements on land with clear title and sufficient legal access is reflective of the entity implementing policies and procedures to ensure the long-term integrity of the ACEP-ALE funded conservation easement. NRCS will also review the final title policy to verify it is insuring the correct parties and is for the full amount of the agricultural land easement purchase price.
- (3) Agricultural land easement deed.—NRCS will review the recorded deed to ensure that it—
  - (i) Was conveyed for the purpose of protecting natural resources and the agricultural nature of the land.
  - (ii) Runs with the land in perpetuity or, where State law prohibits a permanent easement, for the maximum duration allowable under State law.
  - (iii) Protects the agricultural use, future viability, and related conservation value of the parcels by limiting nonagricultural uses of that land or protects grazing uses and related conservation values by restoring and conserving eligible land, including grasslands of special environmental significance.
  - (iv) Provides for the administration, management, and enforcement of the agricultural land easement by the certified eligible entity or its successors and assigns.
  - (v) Permits effective enforcement of the conservation purposes of such easements.
  - (vi) Includes the United States Right of Enforcement clause as stated in the grant agreement.
  - (vii) Ensures the parcel is subject to an agricultural land easement plan.

- (viii) Specifies that impervious surfaces will not exceed 2 percent of the ACEP-ALE easement area, excluding NRCS-approved conservation practices, unless NRCS has granted a waiver to increase the impervious surface limit.
  - (ix) Includes an indemnification clause requiring the landowner to indemnify and hold harmless the United States from any liability arising from or related to the property enrolled in ACEP-ALE.
  - (x) Includes an amendment clause requiring that any changes to the easement deed after its recordation be consistent with the purposes of the agricultural land easement and this part.
  - (xii) Prohibits commercial and industrial activities except those activities that NRCS has determined are consistent with the agricultural use of the land.
  - (xiii) Prohibits or limits the subdivision of the property subject to the agricultural land easement.
  - (xiv) Includes specific protections related to the purposes for which the agricultural land easement was purchased, including provisions to protect historical or archaeological resources or grasslands of special environmental significance.
- (4) Agricultural land easement plan.—For any plans not completed by NRCS and signed by the landowner prior to closing, NRCS will review the agricultural land easement plan and any component plans to ensure that the plans—
- (i) Meet the requirements for an agricultural land easement plan specified in 7 CFR Section 1468.26(a).
  - (ii) Describe the activities that promote the long-term viability of the land to meet the purposes for which the easement was acquired.
  - (iii) Identify required or recommended conservation or management practices or activities that address the purposes and resource concerns for which the parcel was selected.
  - (iv) Identify additional or specific criteria associated with permissible and prohibited activities consistent with the terms of the deed.
  - (v) If the agricultural land easement contains certain land use types, NRCS will review the plan to ensure the required component plans are incorporated and sufficient for each land use type present on the easement as follows:
    - Grasslands must have a grasslands management plan which meets the requirements identified section 528.63, including a description of the grazing management system consistent with NRCS prescribed grazing standards.
    - Forest land as described in section 528.33C(2) has a forest management plan as described in 528.63.
    - Highly erodible land has a conservation plan that meets the requirements of 7 CFR Part 12, 180-NFSAM, and section 528.63. If conversion of highly erodible cropland to less intensive uses is needed, the component conservation plan must be reviewed by NRCS prior to closing.
- (5) Baseline documentation report.—NRCS will review the baseline documentation report, incorporated in the agricultural land easement deed by reference to ensure the report meets the requirements identified in the grant agreement.

C. NRCS will also conduct an annual review of the annual monitoring reports provided by the certified eligible entity. The entity has primary responsibility for monitoring and enforcement of the ACEP-ALE easement. NRCS will ensure that an annual monitoring report has been submitted annually for every NRCS funded conservation easement held by the certified eligible entity. Additionally, each year, NRCS will conduct a detailed review of 15 percent of the annual monitoring reports to ensure the reporting requirements have been met.

D. If NRCS finds that the certified eligible entity did not complete an agricultural land easement deed, title review and insurance, appraisal, or plan as required, or the annual monitoring as required, (440-528-M, First Ed., Amend. 95, March 2015)

NRCS must notify the certified entity in writing. The letter from NRCS must identify the deficiencies, identify the required corrective actions to be taken by the entity, and provide a specified period of time for the entity to correct the deficiencies. If the deficiencies are not corrected to NRCS's satisfaction, NRCS may pursue remedies including but not limited to the return of cost-share funds, decertification of the entity, or termination of the grant agreement. If a deficiency is discovered, NRCS may also conduct a quality assurance review on any or all other parcels funded in the grant agreement.

E. NRCS will also assess the certified entities certification status such that if during the quality assurance review or at any other time, NRCS finds that the certified eligible entity no longer meets the criteria in 7 CFR Section 1468.27 and this subpart NRCS will allow the certified eligible entity a specified period of time, at a minimum 180 days, to take actions necessary to correct the identified deficiencies to continue to meet the criteria as a certified entity.

F. If the certified eligible entity fails to correct the identified deficiencies, NRCS will send a notice of decertification to the eligible entity as provided in this section.

- (1) If the deficiency has not been corrected at the end of the specified time period, NRCS will send written notice by certified mail, return receipt requested, of proposed decertification of the entity and ineligibility for future ACEP-ALE funding. This notice will contain a list of outstanding actions that have not been sufficiently corrected, the status of funds in the grant agreement, and the impact on the eligibility of the entity to apply for or request ACEP-ALE funds.
- (2) The entity may contest the notice of decertification in writing to the Chief of NRCS within 20 calendar days of receipt of the notice of proposed decertification.
- (3) The Chief, or designee, will make a final determination of decertification and send formal notice of decertification to the entity with a copy to the appropriate Regional Conservationist, State Conservationists and the Deputy Chief for Programs. EPD will enter decertifications into NEST.
- (4) NRCS may also determine if any further administrative action is necessary, including whether suspension and debarment action under 2 CFR Parts 180 and 417 should be initiated.

G. Grounds for decertification include, but are not limited to, any of the following:

- (1) Failure to meet ACEP-ALE statutory and regulatory program requirements
- (2) Breach or violation of the terms of an ACEP-ALE grant agreement
- (3) Engaging in a scheme or device to defeat the purposes of ACEP-ALE, including coercion, fraud, misrepresentation, or providing incorrect or misleading information
- (4) Committing any other action of a serious or compelling nature as determined by NRCS that demonstrates the certified eligible entity's inability to meet ACEP-ALE requirements
- (5) Failure to take corrective action to address deficiencies upon notice from NRCS

H. The period of decertification will be 3 years. During these 3 years, the entity is not eligible for any of the benefits of certification.

I. Decertification will result in termination of the grant agreement and ineligibility of the entity to receive funding for any transactions remaining under the grant agreement at the time of termination. NRCS may require the entity to return any financial assistance provided by NRCS for easements that fail a quality assurance review and are not remedied to NRCS's satisfaction. NRCS may determine that the decertified entity no longer qualifies as an eligible entity during the period of decertification or suspension and debarment of the decertified entity.

J. The entity may be recertified upon application to NRCS after the decertification period has expired and when the entity has met the requirements as outlined under 7 CFR Section 1468.27 and this part.



K. EPD will maintain a national list of certified and decertified entities that each State office must check prior to entering into an ACEP-ALE grant or cooperative agreement.